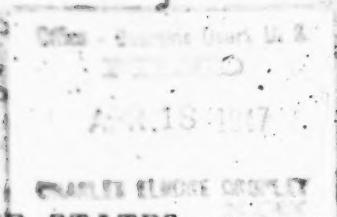


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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1262 69

PANHANDLE EASTERN PIPE LINE COMPANY,  
*Appellant,*

*vs.*

THE PUBLIC SERVICE COMMISSION OF INDIANA,  
*ET AL.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA.

STATEMENT OPPOSING JURISDICTION AND  
MOTION TO DISMISS OR AFFIRM

CLEON H. FOUST,  
*Attorney General of Indiana,*  
FRANK E. COUGHLIN,  
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KARL J. STIPHER,  
*Deputy Attorney General,*  
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SUPREME COURT OF THE UNITED STATES

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PANHANDLE EASTERN PIPE LINE COMPANY,

*Appellant,*

vs.

THE PUBLIC SERVICE COMMISSION OF INDIANA,  
LEROY E. YODER, LAWRENCE E. CARLSON, AND  
LAWRENCE W. CANNON, AS MEMBERS OF THE PUBLIC  
SERVICE COMMISSION OF INDIANA, INDIANA GAS &  
WATER COMPANY, INC., CENTRAL INDIANA  
GAS COMPANY, NORTHERN INDIANA PUBLIC  
SERVICE COMPANY, KOKOMO GAS & FUEL COM-  
PANY, SOUTHERN INDIANA GAS & ELECTRIC  
COMPANY, AND GREENFIELD GAS COMPANY, INC.,

*Appellees.*

**STATEMENT OF MATTERS AND GROUNDS BY AP-  
PELLEES, THE PUBLIC SERVICE COMMISSION OF  
INDIANA, AND THE MEMBERS THEREOF MAKING  
AGAINST THE JURISDICTION OF THIS COURT.**

**Prefatory Statement**

The appellant, hereinafter called the Panhandle, is a large pipe line company which transports natural gas from the Texas-Kansas fields across several middle west states including Indiana. The appellee Commission regulates public utilities in Indiana. The Panhandle has furnished gas to a number of local gas utilities in Indiana for some

time for resale to industrial, commercial and residential consumers, and recently has announced its intention to serve gas directly to industrial users—some of whom have been served by the local utilities in Indiana. One particular industrial user is the Anchor-Hocking Glass Company at Winchester, Indiana, the service to which by Panhandle directly precipitated this litigation. The direct service to industrial users is not within the jurisdiction of the Federal Power Commission.

The Indiana Commission on October 13, 1944 entered upon an investigation of Panhandle, and after extended hearings it concluded it had jurisdiction over the Panhandle in so far as it was furnishing natural gas directly to industrial users in Indiana. On November 21, 1945, the Indiana Commission issued its order, which is being attacked by Panhandle, requiring Panhandle to file with the Commission (1) Its tariffs covering rates, rules and regulations pertaining to sales of natural gas by it *direct* to industrial consumers in Indiana, (2) Its annual reports for the years 1942, 1943, 1944, and each year thereafter, and (3) Copies of statements pertaining to its property filed with the Federal Power Commission.

Appellant Panhandle then filed an action in the Circuit Court at Winchester, Indiana, asking for a court review of said order of the Commission. In such action appellant Panhandle asserted that it was not a utility within the meaning of the Indiana statutes, and that said order violated the commerce clause of the Federal Constitution.

In the proceeding before the court at Winchester, the attorneys for the Commission contended that the order of the Commission merely requiring the filing of certain information did not obstruct or materially interfere with appellant's interstate business and cited the case of *Arkansas Gas Co. v. The Department*, (1938), 304 U. S. 61. Appellant then filed with the Indiana Commission on March 21, 1946,

a written offer to furnish to the Commission the information required in the order of November 21, 1945 upon the condition that the Commission would modify its order to state that the Commission desired the information "for information purposes only" and not as an assertion of regulatory jurisdiction over appellant Panhandle. This offer followed the pattern of the Arkansas Gas Company in the case of *Arkansas Gas Co. v. The Department*, 304 U. S. 61.

The Indiana Commission, on April 3, 1946, rejected the conditional offer of the Panhandle and made a supplemental order stating that the information required by its order would be deemed to be on file for all purposes and uses required or permitted by the provisions of the Public Service Commission Act including, but without limitation, the use thereof in connection with the regulation of the rates and services pertaining to the supplying of natural gas by Panhandle direct to consumers within the State of Indiana.

On May 11, 1946, the Circuit Court at Winchester, Indiana, set aside and vacated the original and supplemental order of the Indiana Commission. On appeal the Supreme Court of Indiana reversed the judgment of the Winchester Circuit Court and held valid the order and supplemental order of the Commission. Appellant Panhandle appeals to this court from the decision of the Indiana Supreme Court.

#### **The Record Does Not Present for Decision Any Substantial Federal Question**

##### **A.**

*Appellant's Contentions Are Foreclosed by Previous Decisions of This Court Which Support the Decision of the Supreme Court of Indiana in This Case.*

Appellant's assignments of error *in toto* claim in substance that the order of the Public Service Commission of

Indiana, dated November 21, 1945, and the statutes of Indiana under which such order was made are invalid as violating Article I, Section 8 (3) (Commerce Clause) of the Constitution of the United States. The validity of an order of a regulatory Commission of the type here involved was before this Court in the case of *Arkansas Gas Co. v. Department* (1938), 304 U. S. 61 and *Natural Gas Pipe Line Company v. Slattery* (1937), 302 U. S. 300. In both cases this Court held said orders to be valid and not to violate the commerce clause of the Federal Constitution.

More specifically, appellant in its assignment of errors claims that the Indiana Commission had no authority to assert power to regulate the rates at which appellant furnishes natural gas directly to industrial consumers. A complete answer to this contention is that the Commission's order did not fix a rate, nor even attempt to, nor even fix a rate hearing. If the Commission's order suggests a rate question, this question also has been before this Court and decided adversely to appellant. (See the cases of *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U. S. 23 (see also opinion of Judge Cardozo, 225 N. Y. 397; 122 N. E. 260) and *Southern Natural Gas Corp. v. Alabama* (1937), 301 U. S. 148.) This same principle sustaining State regulation of rates was also discussed by this Court in the case of *Illinois Natural Gas Co. v. Central Illinois Public Service Co.* (1941), 313 U. S. 498; and in an exhaustive law review article written by Professor Powell of Harvard Law School in 58 Harvard Law Review, pages 1072, 1082, 1084, and 1089.

Appellant also claims in its assignment of errors that the Indiana Supreme Court erred in holding that appellant is a public utility within the meaning of the Indiana statutes. This is a matter of statutory construction and the decision of the Indiana Supreme Court on this question is binding

on this Court. (*Senn v. Tile Layers' Union* (1936), 301 U. S. 468, 477.)

This Court has upheld the power of States to tax the type of activities engaged in by the appellant in this case. (*Southern Natural Gas Corp. v. Alabama* (1937) 301 U. S. 148; *East Ohio Gas Co. v. Tax Commission* (1931), 283 U. S. 465). This Court has also recently held that the power to tax is a dominant power over commerce and that attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations over aspects of such commerce. (*Freeman v. Hewitt* (1946), 67 S. Ct. (Adv. Ed.), 274.) Certainly a sustaining by this Court of the power of a State to tax activities similar to those which appellant is engaging in in this case would *a fortiori* compel a sustaining of the police regulation of the type involved in this case.

B. >

*The Decisions Relied Upon by Appellant as Presenting a Substantial Federal Question Are Not in Conflict With the Decision of the Supreme Court of Indiana in This Case*

The cases of *Missouri ex rel. Barrett v. Kansas Natural Gas Co.* (1924), 265 U. S. 298 and *Public Service Commission v. Attleboro Steam and Electric Co.* (1927), 273 U. S. 83, merely held that the transportation of gas through pipe lines from one State to another, for sale to *distributing companies for resale* to ultimate consumers is interstate commerce precluding State regulation. The instant case before this Court does not involve sales to distributing companies for resale, but sales direct by Panhandle to ultimate industrial consumers in Indiana. At present the Federal Power Commission is expressly authorized to regulate sales by Panhandle to distributing companies for re-

sale. The distinction between the type of activities involved in the two foregoing cases relied upon by appellant, and the type of activity involved in the instant case is clearly pointed out by this Court in the case of *Connecticut Light and Power Co. v. Federal Power Commission* (1945), 324 U. S. 515, 526.

The cases of *Morgan v. Virginia* (1946), 328 U. S. —, 90 L. Ed. (Adv. Op.) 982, 985 and *Southern Pac. Co. v. Arizona*, 325 U. S. 761, 769 clearly are inapplicable here. This Court in these two cases held that the commerce clause of its own force precluded any State regulations because national uniformity in the type of activity therein involved was absolutely necessary in order to insure the free flow of interstate commerce. That such national uniformity is not required in this case is clearly evidenced by the fact that Congress failed to include such activity within the provisions of the Federal Natural Gas Act, and failed to authorize the Federal Power Commission to regulate such activity. Moreover, the commerce involved in the two foregoing cases relied upon by appellant was not consummated in the particular States attempting to regulate, but continued on into other States. In the instant case the regulation involved applies to an activity which comes to an end in the State of Indiana and does not continue to other States. (See *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U. S. 23; *Illinois Natural Gas Co. v. Central Illinois Public Service Co.* (1941), 314 U. S. 498; 58 Harvard Law Review 1072, 1082, 1084 and 1089.)

### Summary

As heretofore shown, the order of the Indiana Commission being attacked does not violate the Commerce Clause of the Federal Constitution and the decision of the Supreme Court of Indiana in this case is in accord with previous

decisions of this Court, and there is no valid basis for distinguishing this case from the decisions in which this Court established such principles. Consequently, there is no substantial Federal question involved—and thus appellees' motion to dismiss or affirm, filed herewith, should be sustained.

(Signed) CLEON H. FOUST,  
*Attorney General of Indiana;*

(Signed) FRANK E. COUGHLIN,  
*1st Deputy Attorney General;*

(Signed) KARL J. STIPHER,  
*Deputy Attorney General;*  
*Counsel for Appellees.*

URBAN C. STOVER,  
*Special Assistant.*

SUPREME COURT OF THE UNITED STATES

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THE PUBLIC SERVICE COMMISSION OF INDIANA,

ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA.

MOTION OF APPELLEES, THE PUBLIC SERVICE  
COMMISSION OF INDIANA AND THE MEMBERS  
THEREOF TO DISMISS, APPEAL OR AFFIRM DE-  
CISION OF STATE COURT.

Now come appellees, The Public Service Commission of Indiana, Leroy E. Yoder, Lawrence E. Carlson, and Lawrence W. Cannon, as members of The Public Service Commission of Indiana, and move to dismiss the appeal herein on the ground that the case presents no substantial Federal question; and they further move, if the motion to dismiss is not granted; that this Court affirm the decision of

the Supreme Court of Indiana on the ground that the questions upon which the decision of this cause depends are so unsubstantial as to need no further argument; all as appears in the Statement of Grounds Making Against the Jurisdiction of this Court, filed herewith.

(Signed) CLEON H. FOUST,

*Attorney General of Indiana;*

(Signed) FRANK E. COUGHLIN,

*1st Deputy Attorney General;*

(Signed) KARL J. STIPHER,

*Deputy Attorney General;*

*Counsel for Appellees.*

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